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THE QUALITIES OF THE REASONABLE MAN IN NEGLIGENCE CASES†

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Negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[1] And this standard of conduct is ordinarily measured by what the reasonably prudent man would do under the circumstances. As everyone knows this reasonable man is a creature of the law's imagination: the present article will seek to examine the qualities with which the law endows its creature, under varying circumstances. This of course is in part the old inquiry whether negligence is subjective or objective.[2] But the inquiry has too often been pursued without paying enough attention to the compensation of accident victims, which is one of the avowed objectives of tort law even under the fault principle.[3] Moreover the practical effects of letting the jury apply the standard in most cases have not always had the attention they deserve.

By and large the law has chosen external, objective standards of conduct. The reasonably prudent man is, to be sure, endowed with some of the qualities of the person whose conduct is being judged, especially where the latter has greater knowledge, skill, or the like, than people generally. But many of the actor's shortcomings such as awkwardness, faulty percep-

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1. AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF TORTS § 282 (1934) (hereinafter cited as RESTATEMENT, TORTS).

2. See Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927); Terry, *Negligence*, 29 HARV. L. REV. 40, 47 *et seq.* (1915); POLLOCK, TORTS 350 (14th ed. 1939); HOLMES, THE COMMON LAW 107 *et seq.* (1881); HARPER, LAW OF TORTS, §§ 70, (1933); PROSSER, TORTS § 36 (1941). *Cf.* Edgerton, *Negligence, Inadvertence and Indifference*, 39 HARV. L. REV. 849 (1925).

3. POLLOCK, TORTS 47 (14th ed. 1939) (Excursus A, by Landon); PROSSER, TORTS §§ 1, 2 (1941); GREEN, JUDGE AND JURY 76-77, 141 (1930).

tion, or poor judgment, are not taken into account if they fall below the general level of the community. This means that individuals are often held guilty of legal fault for failing to live up to a standard which as a matter of fact they cannot meet. Such a result shocks people who believe in refining the fault principle so as to make legal liability correspond more closely to personal moral shortcoming.[4] There has, therefore, been some pressure towards the adoption of a more subjective test. But if the standard of conduct is relaxed for *defendants* who cannot meet a normal standard, then the burden of accident loss resulting from the extra hazards created by society's most dangerous groups (*e.g.* the young, the novice, the accident prone) will be thrown on the innocent victims of substandard behavior. Such a conclusion shocks people who believe that the compensation of accident victims is a more important objective of modern tort law than a further refinement of the tort principle, and that compensation should prevail when the two objectives conflict. The application of a relaxed subjective standard to the issue of *plaintiff's* contributory negligence, however, involves no such conflict. On this issue the forces of the two objectives combine to demand a subjective test: the refinement of the fault principle furthers the compensation of accident victims by cutting down a defense that would stand in its way. For this reason the writer has elsewhere developed the thesis that there should be an explicit double standard of conduct, namely, an external standard for a defendant's negligence, and a (relaxed) subjective standard for contributory negligence.[5] Even if this thesis is rejected, the same result probably prevails anyhow, because the application of the legal standard is largely left to the jury, and juries, by and large, tend to resolve doubts on both issues in favor of plaintiffs.

Recent studies into the causes of accident have raised very acutely the problems mentioned above. These studies show that the accident proneness of a fairly small group of persons causes most of the accidents, and that while accident proneness may often be classed as a personality defect it seldom points to anything like moral fault.[6] The present article does not deal with these studies but rather with the conventional—perhaps archaic—classifications of human traits and attributes usually made in the

4. See Ames, *Law and Morals,* 22 HARV. L. REV. 97, 99 (1908); Bohlen, *Liability on Tort of Infants and Insane Persons,* 23 MICH. L. REV. 9 (1924); Charbonneau v. Mac Rury, 84 N. H. 501, 508, 153 Atl. 457, 461, 462 (1931).

5. James and Dickinson, *Accident Proneness and Accident Law,* 63 HARV. L. REV. 769 (1950).

6. *Id.,* note 5, *supra.*

legal literature on the subject. An attempt will be made however to view these qualities in the light of the modern accident problem and of the various objectives tort law may serve in solving it.

Attributes of the Reasonably Prudent Person; General Considerations

The law here impinges on actual cases predominantly through the language of instructions to the jury, though it may also bear on the exclusion or admission of evidence, and sometimes leads to taking a case away from the jury. To the extent that it is the former, it may well be more a matter of finding a form of statement that will be upheld on appeal than a guide to what factors juries actually consider in determining the negligence issue.[7] However objective the test laid down in the charge, the trial of an accident case always furnishes a host of indications as to the subjective factors (as to what kind of people the parties are) and it is hard indeed to believe that these do not weigh heavily with the jury (and for that matter, with the court). In actual practice the personal equation will be very much taken into account.[8] Since, however, appellate courts and lawyers, for purposes of appeal, analyze the language of the charge on the assumption[9] that juries can and do follow it, we shall proceed on the same assumption to examine the rules which will be given the jury for determining the extent to which they are to judge a party's conduct in the light of his own qualities on the one hand, or by applying the community standard on the other. In this connection one further thing should be noted. Instructions which lay down the reasonable man standard in general terms without specific reference to the following factors will be upheld in the absence of special features

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7. "The difference lies between law in statement and law in operation; between jural postulates and jury judgments." Green, Judge and Jury 178 (1930).

8. "Age, sex, color, temperament, indifference, courage, intelligence, power of observation, judgment, quickness of reaction, self control, imagination, memory, deliberation, prejudices, experience, health, education, ignorance, attractiveness, weakness, strength, poverty, and any of the other possible assortments of qualities and characteristics of the persons involved may each be a factor in the jury's judgment on the negligence issue." Green, *op. cit. supra.*, 180.

"The cautionary charges given by courts are in recognition that some of these factors are considered by juries." Green, *op. cit. supra,* 181, n. 33.

For examples illustrating the effects of the parties' personal characteristics on jury's verdicts generally, see Cornelius, Trial Tactics (1932).

9. It is not implied that the assumption is altogether unwarranted. The judge himself, and the flavor and general tenor of his charge probably often have a great deal of influence and many jurors conscientiously try to follow them. But there are some psychological feats which it is difficult to expect ordinary human beings to perform. See comments of Frank, J., (diss.) in U. S. v. Farina, 184 F. 2d 18, 22 (C. C. A. 2d 1950).

in the case and (where local practice requires it) an appropriate request to charge.[10] But if the judge undertakes to deal with any of these factors specifically, he will be in error if he uses inappropriate language.[11]

Moral Qualities; Judgment

The determination of whether a man's conduct is negligent involves some moral evaluation. As Seavey points out, under the fault theory of liability, an actor "is permitted . . . to condemn the interests of others to his own use to the extent that he is permitted to act without liability although knowing that his conduct involves a substantial chance of injuring persons or property of others."[12] In this weighing of the actor's interests against the perceivable risk to others from attaining them in the way his conduct entails, the test is purely objective. The community conscience and community notions of the proper dividing line between altruism and self-interest govern not those of the individual, be they higher or lower. The same thing is true as to other moral qualities like courage, self-control, and will power.[13]

Clearly the question of the judgment that the actor will be required to exercise looms very large in any evaluation of his conduct. The word, as courts use it, is equivocal. It may refer to the balancing of selfish against altruistic interests referred to in the last paragraph and this is a matter of moral quality. But it may also refer to the quality of being able to perceive and appreciate what risks are involved in a certain activity, and this is more a matter of skill, experience and intelligence than of morals. The ambiguity, however, is not of much consequence as the actor must use the judgment of the standard man in pretty nearly all the senses in which that word is used.[14] This does not mean that errors of judgment will always

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10. Agranowitz v. Levine, 298 Mich. 18, 298 N.W. 388 (1941) (not error to omit consideration of plaintiff's advanced age in instruction on contributory negligence in absence of specific request).

11. Hurzon v. Schmitz, 262 Ill. App. 337 (1932) (omission of reference to child plaintiff's experience); Clary Maytag Co. v. Rhyne, 41 Ga. App. 72, 151 S.E. 686 (1930) (omission of reference to child plaintiff's capacities); *cf.* Sheffield v. Yager, 256 App. Div. 748, 11 N. Y. S. 2d 673 (1st Dep't 1939) (instruction that child plaintiff "not held to such degree of care as an adult or a person of mature years" inadequate; plaintiff requested further instructions).

12. Seavey, *Negligence—Subjective or Objective?*, 41 Harv. L. Rev. 1, 8, n. 7 (1927).

13. Seavey, *op. cit., supra.*, n. 12, pp. 10, 11. "Excessive altruism is as much a departure from the standard morality as excessive selfishness . . ." *Id.*, p. 11.

14. "Instead . . . of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which

be negligence.[15] As we have noted, the standard man is not infallible and conduct is to be judged as of the time it is engaged in, not with the benefit of hindsight.[16] Mistakes in judgment which the standard man might have made in the light of these limitations will not amount to negligence.[17]

KNOWLEDGE, EXPERIENCE, PERCEPTION OF THE RISK

Knowledge is fundamental to liability for negligence.[18] The very concept of negligence presupposes that the actor either does foresee an unreasonable risk of injury, or could foresee it if he conducted himself as a reasonably prudent man. Foreseeability of harm, in turn, unless it is to depend on supernatural revelation, must depend on knowledge.[19] Knowledge has been defined as the consciousness of the existence of a fact,[20] and fact includes not only objects apparent to the senses but the characteristics and traits of people and animals and the properties and propensities of things—the laws of nature, human and otherwise.[21]

It has often been pointed out that conduct is to be judged as of the time it is engaged in,[22] and it is the knowledge which the actor had or

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requires in all cases a regard to caution such as a man of ordinary prudence would observe." per Tindal, C. J. in Vaughan v. Menlove, 3 Bing. N. C. 468, 475 (1837). See Oceanic Steam Navigation Co. v. Aitken (The Germanic), 196 U. S. 598, 49 L. Ed. 610, 25 Sup. Ct. 317 (1905).

15. "Even a standard man, being human and therefore fallible may err." Terry, *Negligence,* 29 HARV. L. REV. 40, 48 (1915).

16. Rzeszewski v. Barth, 324 Ill. App. 345, 58 N.E. 2d 269 (1945) (defendant not negligent in striking plaintiff's car while veering back onto roadway from narrow shoulder on which he had been forced by oncoming car); Noll v. Marion, 347 Pa. 213, 32 A. 2d 18 (1943) (defendant's bank clerk not negligent in ducking instead obeying hold up man's order to remain still); Oceanic Steam Navigation Co. v. Aitken (The Germanic), *supra.,* p. 595.

17. Peck v. United States, 172 F. 2d 331 (C. C. A. 10th 1949) (plaintiff held *not* to have acted as prudent man when he made sharp turn to right on being overtaken by army ambulance); V. T. C. Lines v. Murray, 309 Ky. 643, 218 S.W. 2d 675 (1949) (error not to give instruction on emergency doctrine where bus driver suddenly confronted by boy on bicycle); Gamalia v. Badillo, 53 Cal. App. 2d 375, 128 P. 2d 184 (1942) (defendant not negligent in applying brakes when back wheel broke off).

18. "The foundation of liability for negligence is knowledge—or what is deemed in law to be the same thing, 'opportunity, by the exercise of reasonable diligence to acquire knowledge—'" See Green v. Atlantic Charlotte Air Line Ry., 131 S. C. 124, 133, 126 S.E. 441, 444, 48 A. L. R. 1448 (1925). See also Bruner v. Seelbach Hotel Co., 133 Ky. 41, 49, 117 S.W. 373, 376 (1909).

19. "An essential element of negligence is a knowledge of facts which render foresight possible . . ." per Green, J. in Hope v. Full Brook Coal Co. 3 App. Div. 70, 75, 38 N. Y. Supp. 1040, 1043 (4th Dep't 1896).

20. Seavey, *Negligence—Subjective or Objective?,* 41 HARV. L. REV. 1, 17 (1927).

21. See Note, 23 MINN. L. REV. 628 (1938) for an exhaustive collection of facts the individual is required to know; RESTATEMENT, TORTS § 290 (1934).

22. See, *e.g.,* HARPER, LAW OF TORTS § 72 (1933); Doherty v. Arcade Hotel, 170 Ore. 374, 134 P. 2d 118 (1943).

ought to have had at that time which is significant here. Clearly conduct is to be judged in the light of all relevant knowledge which the actor actually then had,[23] without regard to any external standard. If a man in fact sees a half-hidden depression on a stairway or knows the properties of a rare chemical combination, or remembers a dangerous curve in a road he has not been over for many years, he will be held to that knowledge even if a reasonably prudent man under the circumstances might not have acquired or remembered it. Trouble may of course be encountered in the matter of proof, but the theory can scarcely be doubted.

A further point should be noted. One of the things a man may know is his own ignorance, and this in itself may often be found to call for precautions against possible but unknown danger. Thus, one who finds himself in a strange dark hallway must take precautions against possible "obstructions to his passage and pitfalls to his feet."[24]

When we get beyond the realm of what the actor actually knew, the problem is more complex and the authorities less harmonious, although some propositions command wide support. Unless at least the actor has a physical impairment of his senses or is insane or a child, he must be sufficiently attentive to his surroundings to perceive what the reasonable man would;[25] he will be held to see the obvious[26] and hear the clearly audi-

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23. Thus a dealer in fur coats with knowledge that some people are allergic to a particular dye must take precautions which would be unnecessary had he remained oblivious to that fact. Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48, 48 L. R. A. (N. S.) 224 (1913) (dictum). In Parrott v. Wells (The Nitroglycerine Case), 15 Wall. 524 (U. S. 1872), what was held to be ordinary care in the handling of a package would have been negligence had the actor known the package contained nitroglycerine. In Smithline v. Hadigrian, 34 N. Y. S. 2d 509 (City Ct. N. Y. 1942), the plaintiff, having observed a janitress washing marble stairs on his ascent, was held contributorily negligent for slipping on the stairs upon descending a short time later.

24. Benton v. Watson, 231 Mass. 582, 121 N.E. 399 (1919); Plahn v. Masonic Hall Bldg. Ass'n, 206 Minn. 232, 288 N.W. 575 (1939); Prokey v. Hamm, 91 N.H. 513, 23 A. 2d 327, 329 (driving with shimmy in front wheels—"Where knowledge is necessary to careful conduct, voluntary ignorance is equivalent to negligence."); Ouligan v. Butler, 189 Mass. 287, 75 N.E. 726 (1905) (pouring cleaning solution on spilled nitroglycerine and scrubbing with broom without determining effects of solution on the nitroglycerine). RESTATEMENT, TORTS § 289, comment *j*.

25. For example, a reasonably prudent person would perceive the violence of a wind and the consequent danger of descending an open stairway. Belcher v. City and County of San Francisco, 69 Cal. App. 457, 158 P. 2d 996 (1945). See RESTATEMENT, TORTS § 289, comments *g* and *e*.

26. Oran v. Kraft-Phenix Cheese Corp., 324 Ill. App. 463, 58 N.E. 2d 731 (1944) (failure to see two inch red reflecter on bicycle); Southern California Freight Lines v. San Diego Electric Ry., 66 Cal. App. 2d 672, 152 P. 2d 470 (1944) (plaintiff must look with seeing eyes); Stone v. Mullen, 257 Mass. 344, 153 N.E. 565 (1926) (plaintiff negligent as a matter of law in not seeing unlighted truck in roadway where evidence showed that the truck was visible for a hundred yards);

ble.[27]. Even here, however, there is a good deal of room for subjective factors. Not all situations call for the same degree of attentiveness on the part of the standard man,[28] and the question whether any given situation requires special alertness may depend on the observer's past experience.[29] Thus, a driver who for any reason knows that a railroad runs through some unlikely region may be required to use greater vigilance to discover a blind grade crossing than one who is excusably ignorant of that fact. Knowledge or experience of a specific fact like this is always individualized and the actor will not be charged with it unless a reasonable man would have acquired it, or unless the actor himself once knew it but negligently forgot it.

Memory is also judged objectively by the standard of the reasonably prudent man. The normal adult is required to possess the ability to remember which a reasonably prudent man possesses both as to the character of the phenomena which he must remember and as to the circumstances under which he is required to remember them.[30] An actor must keep in

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Anderson v. Old Colony St. Ry., 214 Mass. 505, 101 N.E. 1072 (1913) (failure of motorman to observe overhanging pole on wagon).

27. McClafferty v. Fisher, 1 Sadler 161, 2 Atl. 60 (Pa. 1885) (experienced oil pumper held to have heard hissing of newly struck well and was therefore negligent in approaching vicinity with lighted lantern).

28. "Every traveler upon a highway is bound to exercise the care of the ordinarily prudent and cautious person under all circumstances. The degree of vigilance and continuity of alertness necessary to attain that standard vary with the time and place, surroundings and means of transportation." Commonwealth v. Horsfall, 213 Mass. 232, 235, 100 N.E. 362, 363 (1913). See Lynch v. Fisk Rubber Co., 209 Mass. 16, 95 N.E. 400 (1911), where the court held that it was for the jury to determine whether the driver's inattention in conversing with a passenger was negligence under the circumstances. See RESTATEMENT, TORTS § 289, comment *k;* Degnan v. Olson, 136 Conn. 171, 69 A. 2d 642 (1949).

There has perhaps been an increasing tendency to take account of what the Pennsylvania court has aptly called "attention arresters." See Johnson v. Rulon, 363 Pa. 585, 70 A. 2d 325 (1950). Thus advertising matter, an attractive display of wares, or even a menu on the wall, may be considered in deciding whether plaintiff, whose attention was thus diverted, was negligent in failing to see a dangerous condition which would be obvious to one who looked towards it. The cases are often ones where a customer sues a proprietor of business premises (who also furnished the "attention arrester"). But the notion may be applicable to other cases as well, so far as judging the reasonableness of plaintiff's conduct goes. Note, 2 ALA. L. REV. 373 (1950).

29. Davis v. Boston & M. R.R., 70 N. H. 519, 523, 49 Atl. 108 (1900) (plaintiff who saw train standing in station and knew from past experience that engine would be sent to roundhouse was negligent in not looking behind him while walking down the tracks to roundhouse). See RESTATEMENT, TORTS § 289, comment *n.*

30. City of Charlottesville v. Jones, 123 Va. 682, 97 S.E. 316, 324 (1918) (upholding trial court's modification of defendant's request to charge on plaintiff's negligence "provided an ordinarily prudent person under similar circumstances would have remembered it.") See RESTATEMENT, TORTS § 289, comment *f.*

In his very excellent article on this subject Professor Seavey suggests that memory seems to be a purely mechanical process closely approaching the physical

mind those things which would make an impression on the standard man. As a general rule, forgetfulness is no excuse.[31] If the actor realizes that he is by nature forgetful, he will be required to exercise his faculties to a higher degree to compensate for this infirmity.[32] The actor is excused only if the cause of his lapse in memory was such as would induce forgetfulness in the hypothetical standard man.[33] The actor is usually excused if he is startled[34] or if there is sufficient reason for distracting his attention.[35] If the actor

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processes. He concludes that a subjective test should be applied, as it is with physical shortcomings. This would not preclude the possibility of negligence in forgetting a danger, for ". . . if the actor once knew but subsequently forgot, his liability would be based upon the answer to the question as to whether or not at the time he forgot he should have anticipated that forgetting the fact might be a cause of injury and whether the forgetting was due to a failure in his 'objective' qualities." Seavey, *op. cit., supra,* n. 2, 20-22. If the reasoning be followed, should not the critical time be the last time he thought of the danger *before he forgot,* rather than "the time he forgot"? The fact that this line of reasoning leads to such a question shows, it is submitted, that it is too precious for practical use even by appellate courts (to say nothing of its helpfulness in instructing juries!).

31. City of Charlottesville v. Jones, 123 Va. 682, 97 S.E. 317, 324 (1918). In Coppins v. Jefferson, 126 Wis. 578, 105 N.W. 1078 (1905), it was said that forgetting an obstruction in the highway created a presumption of negligence which, however, yields readily to any reasonable explanation. See also Collins v. City of Janesville, 111 Wis. 348, 87 N.W. 241 (1901). In Ramos v. Service Bros., 118 Cal. App. 432, 5 P. 2d 623, 624 (1931), the following instruction was upheld:

"One who works at a dangerous vocation, or one who voluntarily places himself in a position of danger, cannot close his eyes to such danger or momentarily forget a known danger, but is required to exercise a quantum of care that is commensurate with such danger as may be known to him. And if he momentarily forgets such known danger or closes his eyes to such danger, and is thereby injured, and the proximate cause of his injury is his forgetfulness of such danger, or his failure to make reasonable use of his faculties under such circumstances, he cannot recover for the injury."

32. Reynolds v. Los Angeles G. & E. Co., 162 Cal. 327, 122 Pac. 962, 39 L.R.A. (N.S.) 896 (1912) (75 year old woman held negligent for forgetting excavation in front of her house).

33. In Kitsap County Transportation Co. v. Harvey, 15 F. 2d 166, 48 A.L.R. 1420 (1926), the court excused the plaintiff's failure to remember that the seat she occupied as a passenger on defendant's boat was raised above the level of the aisle. "That people do in forgetfulness trip over unusual obstacles upon a floor with which they are familiar, or stumble over unusual steps under like circumstances is a matter of common knowledge." (p. 168). In Deacy v. McDonnell, 131 Conn. 101, 38 A. 2d 181 (1944) it was held that a person who had been over a step four times before might as a matter of fact be reasonable in forgetting it.

34. In Williams v. Ballard Lumber Co., 41 Wash. 338, 83 Pac. 323 (1906), plaintiff's forgetfulness was excused when he was startled by the unexpected starting of machinery under which he was working.

35. Kelly v. Blackstone, 147 Mass. 448, 18 N.E. 217, 9 Am. St. Rep. 730 (1888) (elderly woman crossing street at night to avoid encountering strangers); Weare v. Inhabitants of Fitchburg, 110 Mass. 334 (1872) (anxiety caused by being called home suddenly to attend to children); Crites v .City of New Richmond, 98 Wis. 55, 73 N.W. 322 (1897) (distracted by friend's greeting); Cuminsky v. City of Kenosha, 87 Wis. 286, 58 N.W. 395 (1894) (timid woman hurrying to avoid meeting large group of men); West Ky. Tel. Co. v. Pharis, 25 Ky. L. Rep. 1838, 28 S.W. 917 (1904) (preoccupation with thought of sick sister); Houston v.

has no legally acceptable excuse, he must remember for a reasonable length of time. Older cases were often pretty strict in ruling that a lapse of memory after a fairly short period was negligence as matter of law.[36] But the tendency has probably been towards letting all but the most flagrant cases go to the jury.[37]

The next problem concerns the extent to which a man will be held to matters of common knowledge. To revert to our hypothetical driver who encounters a blind grade crossing in a strange and remote territory, the question still remains whether he is to be charged with the knowledge that in this country of ours railroads are (or at least were) likely to be found in the most unlikely places.[38] Probably every one will be treated as though he knew certain fundamental facts and laws of nature which belong to universal human experience, such as the laws of gravity,[39] the principles of leverage,[40] the fact that water drowns,[41] fire burns,[42] and smoke suffocates.[43] The actor is required to have certain knowledge concerning himself, such

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Town of Waverly, 225 Ala. 98, 142 So. 80 (1932) (distracted by son on bicycle). See 21 L.R.A. (N.S.) 648 *et. seq.* for collection of cases. However, mere preoccupation is no excuse. Buckley v. Westchester Light Co., 73 App. Div. 436, 87 N. Y. Supp. 763 (2nd Dep't 1904); nor curiosity—Davis v. California Street Cable Co., 105 Cal. 131, 38 Pac. 647 (1894); nor forgetfulness due to a self-induced diversion, such as engaging in a conversation—Bender v. Minden, 124 Iowa 685, 100 N.W. 352 (1904). *Contra* as to conversation—Wheeler v. Town of Westport, 30 Wis. 392 (1872).

36. Bassett v. Fish, 75 N. Y. 303 (1878) (forgetting hole in floor after three weeks excused); Wood v. Richmond & D. RR., 100 Ala. 660, 13 So. 552, 39 L.R.A. (N.S.) 900 (1893) (forgetting pile of timber in 24 hours not excused).

37. See notes 30-36, *supra.*

38. Compare Piscitello v. N. Y., N. H., & H. R.R., 116 Conn. 638, 166 Atl. 61 (1933) (where the crossing should have been observed) with McClure v. Southern P. Co., 41 Cal. App. 652, 183 Pac. 248 (1919) and Harwood v. Missouri P. R.R., 118 Kan. 332, 234 Pac. 990 (1925) (where the court thought the traveler's failure to notice it was excusable). Cases are collected in a note, 40 A.L.R. 1309 (1926). See also 93 A.L.R. 218, 221 (1934).

39. Seaboard Airline Ry. v. Hackney, 217 Ala. 382, 115 So. 869, 874 (1928) (unbalanced railroad ties); Brown v. Swift & Co., 91 Neb. 532, 136 N.W. 726 (1912) (tendency of wheeled vehicle to roll down incline).

40. City of Huntingburg v. First, 15 Ind. App. 552, 43 N.E. 17 (1896) (tendency of loose plank to tip when stepped on); Stobba v. Fitzsimmons, Connell Co., 58 Ill. App. 427 (1895) (plaintiff standing on end of plank thrown in air when derrick dropped lumber on other end).

41. City of Evansville v. Blue, 212 Ind. 130, 8 N.E. 2d 224 (1937) (11 year old boy); Peters v. Bowman, 115 Cal. 345, 47 Pac. 113 (1896) (11 year old boy).

42. Gates v. Boston & M. R.R., 255 Mass. 297, 151 N.E. 320 (1926) (burning of railroad ties causing forest fire).

43. Lexington & E. Ry. v. White, 182 Ky. 267, 206 S.W. 467 (1918) (railroad running engines in rapid succession through tunnel in which plaintiff was working).

as his ability to lift and carry heavy objects,[44] the equilibrium of his body,[45] the amount of space he occupies,[46] and certain elementary rules of personal hygiene.[47] He is also treated as though he knows the law.[48]

In addition, people who have had an ordinary amount of exposure to the facts of modern life in America will be treated as though they know many other things. The normal adult is held to have knowledge of the characteristics of animals common to his community, such as the proneness of mules to kick,[49] the viciousness of bulls,[50] and the propensity of mad dogs to bite.[51] He is also required to be acquainted with the natural propensities

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44. "Every man will be presumed to know more about his own strength and to be better informed as to his ability to lift than is a stranger" per Griffin Smith, Ch. J. in Missouri Pacific R.R. v. Vinson, 196 Ark. 500, 118 S.W. 2d 672 (1938) (rupture from stacking railroad ties); Sweeney v. Winebaum, 84 N. H. 217, 149 Atl. 77 (1930) (plaintiff suffering from tuberculosis strained while carrying heavy load); Louisville & N. R.R. v. Sawyers, 169 Ky. 671, 184 S.W. 1123 (1916).

45. In Sharpe v. Higbee Co., 56 Ohio App. 278, 10 N.E. 2d 932, 933 (1936), the court upheld the following charge: "The court says to you as a matter of law, ladies and gentlemen of the jury, that the question of balance of an individual is entirely within the individual. If you find that the plaintiff sustained her accident as a direct result of the losing of her balance, at the time complained of, your verdict herein should be in favor of the defendant." See also Hesse v. National Casket Co., 66 N.J.L. 652, 52 Atl. 384 (1902) (16 year old boy held to know likelihood of falling from bench if he moved too far from its center of gravity).

46. Jennings v. Tacoma Ry. & Motor Co., 7 Wash. 275, 34 Pac. 937 (1893) (attempt by plaintiff to squeeze body through space 3½ inches wide).

47. "In these modern days the child in the public school is taught the lessons of hygiene gathered by the scientific investigators. In this country the knowledge of the school child is the knowledge of the public. . . ." per Graves, J. in Valley Spring Hog Ranch Co. v. Plagmann, 282 Mo. 1, 10, 220 S.W. 1, 15 A.L.R. 266 (1920). See Kroger Grocery & Baking Co. v. Woods, 205 Ark. 131, 162 S.W. 2d 869 (1943) (moldy food unfit for consumption); Jurovich v. Interstate Iron Co., 181 Minn. 588, 233 N.W. 465 (1930) ("Ignorance and inexperience cannot be so great as not to appreciate the physical hazards of working in ice cold water"); Hicks v. Southern Ry., 23 Ga. App. 594, 99 S.E. 218 (1919) (the results of exposure in a cold room).

48. Mazza v. Greenstein, 80 N.E. 2d 216 (Ohio App. 1948) (that motorist entering public street from private driveway must yield right of way); Rodgers v. Cox, 130 Conn. 616, 36 A. 2d 373 (1944); Dow v. Brown, 193 So. 239 (La. App. 1939) (yielding right of way at intersection). *But cf.* Evers v. Davis, 86 N.J.L. 196, 90 Atl. 677 (1914); James, *Statutory Standards & Negligence in Accident Cases*, 11 LA. L. REV. 95, 118 (1950).

49. Tolin v. Terrell, 133 Ky. 210, 117 S.W. 290 (1903); Borden v. Falk, 97 Mo. App. 566, 71 S.W. 478 (1903) (viciousness and treacherousness of mules).

50. Gaccione v. State, 173 Misc. 367, 18 N. Y. S. 2d 161 (Ct. Cl. 1940); Haack v. Rodenbour, 234 Iowa 368, 12 N.W. 2d 861 (1944) (especially during breeding season).

51. Brune v. DeBenedette, 261 S.W. 930 (Mo. App. 1924); Clinkenbeard v. Reinert, 284 Mo. 569, 225 S.W. 667, 13 A.L.R. 485. (1920). Also, the viciousness of stallions—Hammond v. Melton, 42 Ill. App. 186 (1891). *Cf.* Garcia v. Sumrall, 58 Ariz. 526, 121 P. 2d 640 (1942) (discussions of the notorious propensity of grazing animals to wander in search of food and water).

of children,[52] the dangers incident to common sports,[53] and the elements of the weather to which he is accustomed.[54] As the complexity of his civilization increases, the actor is required to possess an ever increasing store of knowledge of scientific facts; such as the dangerous properties of electricity,[55] the hazards involved in revolving machinery,[56] the dangerous properties of certain chemicals,[57] and the inflammability of petroleum.[58] The dangers inherent in common modes of travel,[59] the perils involved in handling firearms,[60] the intoxicating qualities of alcoholic beverages,[61] and the physical characteristics of common substances. These rules have often been re-

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52. Such as their heedlessness—Femling v. Star Publication Co., 195 Wash. 395, 81 P. 2d 293 (1938); the attractiveness of ponds of water—Davoren v. Kansas City, 308 Mo. 513, 273 S.W. 401, 40 A.L.R. 473 (1925); the attractiveness of dangerous objects such as explosives—Wellman v. Fordson Coal Co., 105 W. Va. 463, 143 S.E. 160 (1928); childish impulses—Louisville & N. R.R. v. Vaughn, 292 Ky. 120, 166 S.W. 2d 43 (1943); climbing propensity—Deaton's Adm'r v. Kentucky & West Virginia Power Co., 291 Ky. 304, 164 S.W. 2d 468 (1942); propensity of small children to wander into streets—Agdeppa v. Glougie, 71 Cal. App. 2d 463, 162 P. 2d 944 (1945).

53. Baseball—Keys v. Almo City Baseball Co., 150 S.W. 2d 368 (Tex. Civ. App. 1941); Hummel v. Columbus Baseball Club, 71 Ohio App. 321, 49 N.E. 2d 773 (1943); hockey—Ingersall v. Onondaga Hockey Club, 245 App. Div. 137, 281 N. Y. Supp. 505 (3d Dep't 1935). *Contra*: Thurman v. Ice Palace, 36 Cal. App. 2d 364, 97 P. 2d 999 (1939); Shanney v. Boston Madison Sq. G. Corp., 296 Mass. 168, 5 N.E. 2d 1 (1936). See notes, 10 So. CAL. L. REV. 67 (1936); 17 B.U.L. REV. 485 (1937).

54. Mayor and City Council of Baltimore v. Thompson, 171 Md. 460, 189 Atl. 822 (1937) (the fog in Baltimore); Staples v. City of Spencer, 222 Iowa 1241, 271 N.W. 200 (1937) (ice formations); Olson v. McMullen, 34 Minn. 94, 24 N.W. 318 (1885) (effect of thawing frost on embankment).

55. Roland v. Griffith, 291 Ky. 248, 163 S.W. 2d 496 (1942); LeVonas v. Acme Paper Board Co., 184 Md. 16, 40 A. 2d 43 (1944) (that any line carrying electricity is dangerous).

56. Such as saws—Gaertner v. Schmitt, 21 App. Div. 403, 47 N. Y. Supp. 521, 44 L.R.A. 52n (1st Dep't 1897); cogs—Ruchinski v. French, 168 Mass. 68, 46 N.E. 417 (1897); fans—Dillinberger v. Weingartner, 64 N.J.L. 292, 45 Atl. 638 (1900); set-screw on revolving shaft—American Malting Co. v. Lelivelt, 101 Ill. App. 320 (1902).

57. Such as explosives—Commanche Duke Oil Co. v. Texas Pac. Coal & Oil Co., 298 S.W. 554 (Tex. Comm. App. 1927). But not the identity of explosives—Parrott v. Wells (The Nitroglycerine Case), 15 Wall. 524 (U. S. 1872). That lye burns—Schultz v. Klinabren, 177 So. 450 (La. App. 1937).

58. Parton v. Phillips Petroleum Co., 231 Mo. App. 585, 107 S.W. 2d 167 (1937) (kerosene); Burnett v. Amalgamated Phosphate Co., 96 F. 2d 974 (C.C.A. 5th 1938) (gasoline); Simpkins v. R. L. Morrison & Sons, 107 F. 2d 121 (C.C.A. 5th 1939) (gasoline fumes).

59. Such as the dangers of boarding a train—Murphy v. Pere Marquette R.R., 183 Mich. 435, 150 N.W. 122 (1914); descending from train—L.S. & M.S. Ry. v. Bangs, 47 Mich. 470, 11 N.W. 276 (1882); that skidding on wet surface increases with speed—Wolfe v. State for use of Brown, 173 Md. 103, 194 Atl. 832 (1937); that overcrowding of the driver's seat impairs control of automobile—McIntyre v. Pope, 326 Pa. 172, 191 Atl. 607 (1937).

60. McMillen v. Steele, 275 Pa. St. 584, 119 Atl. 721 (1923).

61. *Cf.* Osborn v. Leuffgen, 381 Ill. 295, 45 N.E. 2d 622 (1943).

ferred to as presumptions. Certainly they reflect what is generally the fact and may at least be taken as true, in the first instance, without proof.[62] But occasionally the law has gone further either for reasons of administrative convenience or of policy, and has crystallized the rule in some situations so as to preclude proof in rebuttal so that if one insists on speaking on terms of presumptions, he will call these "conclusive." Since credible proof of this nature is so seldom offered, and since the courts often employ confusing language, it cannot be told whether the rule is substantive, in many instances, or simply a rejection of proffered evidence as unworthy of belief. Nor does it usually matter, since in any event the actor will be held bound to acquire the knowledge and experience which a reasonable man would have concerning the world about him. It is only where he is a stranger or in some way has had an unusually limited background that the distinction becomes important, and where that is the case it will probably be found that genuine and reasonable ignorance will be considered in all but a very few situations.[63] But even where it is, the actor must realize his ignorance and take precautions suitable in the light of it, if the man of standard intelligence and judgment could appreciate that the situation made the ignorance dangerous.[64]

In addition to the knowledge and experience with which people generally will be charged in conducting the ordinary affairs of life, men who engage in certain activities or come into certain relationships with people or things are under peculiar obligation to acquire knowledge and experience about that activity, person, or thing. As it has aptly been put, every man is required to have knowledge of "the quality of his beast."[65] Thus, an occupier of land owes a duty to business visitors[66] to know of dangerous conditions of the premises which could be discovered by reasonable inspection;[67] the

62. Terry has pointed out the possible source of confusing the substantive rule with this question of proof. Terry, *Negligence*, 29 HARV. L. REV. 40, 50 (1915).

63. "Thus a hermit hearing, without explanation, a radio for the first time, or a savage, suddenly dropped from his native swamps into the streets of New York, cannot be judged except with reference to what he knows." Seavey, *op. cit. supra*, p. 19. See Lorenzo v. Wirth, 170 Mass. 596, 49 N.E. 1010, 40 L.R.A. 347 (1897), where a Spanish woman stepped into a coal hole in Boston. Although the court didn't consider her contributory negligence, the language indicated that, had they considered it, they would have taken into account her ignorance.

64. Michigan City v. Rudolph, 104 Ind. App. 643, 12 N.E. 2d 970 (1938) (driving in sand when unaccustomed to doing so); Terry, *Negligence*, 29 HARV. L. REV. 40, 48 (1915); RESTATEMENT, TORTS § 289 *j*.

65. Hale, P. C. 430, quoted by Maxey, J. in Pope v. Reading Co., 304 Pa. 326, 333, 156 Atl. 106, 107 (1931).

66. PROSSER, TORTS § 79 (1941).

67. Falkenberry v. Shaw, 183 Ark. 1019, 39 S.W. 2d 708 (1931).

carrier owes to his passengers the duty of discovering all detectable defects;[68] the landlord who furnishes appliances for his tenants is required to find out about the risks they entail;[69] and the manufacturer must learn of dangers that lurk in his processes and his products. Thus, when a purchaser of perfume suffered a second degree burn from the perfume, a Massachusetts court recently imputed to the maker knowledge of the harmful nature of the offending ingredient.[70] A New York court held that a dress manufacturer should realize the fire risk involved in treating an evening gown with nitrocellulose.[71] A barber was held bound to know that using a vibrator over the closed eye might cause detachment of the retina.[72] Traditionally the professional man has had to keep reasonably abreast of current advances in his field.[73]

As scientific knowledge advances, more risks can be discovered and avoided. Those who deal with matters affected by these advances must keep reasonably abreast of them. What is excusable ignorance today may be negligence tomorrow. In the last century little was known of allergies and a manufacturer could scarcely be charged with knowledge that chrome mordanted stockings might produce ulceration.[74] Today the manufacturer

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68. Central of Georgia R. R. v. Robertson, 203 Ala. 358, 83 So. 102 (1919).

69. Gobrecht v. Beckwith, 82 N. H. 415, 135 Atl. 20, 52 A.L.R. 858 (1926) (landlord installing gas water heater in bathroom used by his tenants charged with knowledge of the danger of monoxide poisoning due to inadequate installation). But he need use only reasonable care to make such discoveries. Doherty v. Arcade Hotel, n. 22 *supra*, (innkeeper not as matter of law bound to know about dangers of porcelain faucets within 3½ years after their abandonment in plumbing trade).

70. Carter v. Yardley & Co., Ltd., 319 Mass. 92, 64 N.E. 2d 693, 164 A.L.R. 559 (1946).

71. Noone v. Fred Perlberg, 268 App. Div. 149, 49 N. Y. S. 2d 460 (1st Dep't 1944), *aff'd.* 294 N. Y. 680, 60 N.E. 2d 839 (1945). Dayton v. Harlene Frocks, 274 App. Div. 1015, 86 N. Y. S. 2d 614 (3d Dep't 1948).

72. Cornbrooks v. Terminal Barber Shops, 282 N. Y. 217, 26 N.E. 2d 25 (1940). In Zesch v. The Abrasive Co. of Philadelphia, 353 Mo. 558, 183 S.W. 2d 140, 156 A.L.R. 469 (1944) the company was held to have knowledge of a defect in a grinding wheel although they possessed no instruments capable of discovering the defect, on the ground that such an inspection was reasonable. In Air Reduction Co. v. Philadelphia Storage Battery Co., 14 F. 2d 734 (C.C.A. 2d 1926) a company supplying high pressure oxygen discharge manifolds was held to knowledge of the dangers involved in using steel in the manifold. For collection of cases and discussion of the duty of an employer to know of dangers lurking in dangerous instrumentalities placed in the hands of his servants, see Grammar v. Mid-Continent Petroleum Corp., 71 F. 2d 38, 41 (C.C.A. 10th 1934).

73. Sinz v. Owens, 196 P. 2d 52 (Cal. Dist. Ct. App. 1948). "The duty imposed on a physician or surgeon is to employ such reasonable skill and diligence as is ordinarily exercised in his profession in the same general neighborhood having due regard to the advanced state of the profession at the time of the treatment." —McHugh v. Audet, 72 F. Supp. 395, 399 (M.D. Pa. 1947).

74. Gould v. Slater Woolen Co., 147 Mass. 315, 17 N.E. 531 (1888).

must acquire knowledge of such things.[75] Only a few years ago there was no way to detect a transnase fissure in a steel rail.[76] Today this can be done by the Sperry Detector car,[77] and the conduct of railroads will be judged in the light of this fact.[78] As techniques for detecting accident proneness becomes perfected, employers will have to take account of them so as to remove accident prone employees from posts of danger.

Perception of the risk is the sum of all that has heretofore been dealt with in this section. It is the correlation of past experience with the specific facts in a situation. If a reasonable man with the actor's own knowledge and experience plus the knowledge and experience with which he is charged would perceive a risk in the conduct in question the actor will be held to perceiving that risk. The courts, of course, set the outer boundary to what a man may reasonably be held to foresee. But a judgment upon this question, in the nature of things, may be exercised within wide limits, and this is one of the focal points where the concept of negligence is being expanded. Not only have the scientific advances noted above enlarged the scope of what a jury may find to be foreseeable, but a quickening social conscience and the general trend towards wider liability have led the courts to perceive risks in ordinary activities of men where not so long ago they ruled them out of the permissible range of what might be found.[79]

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75. Grant v. Australian Knitting Mills [1936] A.C. 85, 9 Australian L. J. 288, 352 (1935) (free sulfite in underwear causing dermatitis).

76. Central of Georgia R.R. v. Robertson, 203 Ala. 358, 83 So. 102 (1919); Chesapeake & O. Ry. v. Baker, 149 Va. 549, 141 S.E. 753 (1928).

77. N. Y. Times, Dec. 17, 1941, p. 7, col. 6.

78. "Carriers are under the highest duty to provide and maintain suitable and safe equipment and appliances; their safety should be established by the very best and surest tests recognized by experts in the business, and nothing can exempt them from liability for defects therein except that they are latent ones which no reasonable degree of skill and diligence would discover or prevent . . . They are required to keep pace with the science and art of their business . . ." per Mayfield, J., in Central of Georgia R. R. v. Robertson, *supra* n. 76 at p. 104.

79. An example of this is the increasing tendency of courts to hold defendants to foresee the negligent or criminal acts of third persons. For example, a railroad in whose station hoboes were accustomed to loiter was held negligent in failing to provide guards to prevent assaults on women passengers—Neering v. Illinois Cent. R. R., 383 Ill. 366, 50 N.E. 2d 497 (1943). In Nuss. v. State, 87 N. Y. S. 2d 592 (N. Y. Ct. 1949), the state of New York was held to have foreseen the possibility of a motorist failing to obey a stop sign. See also Kientz v. Charles Dennery, 17 So. 2d 506 (La. App. 1944) (truck driver with green light in his favor negligent in not seeing automobile speeding negligently towards intersection.). The older attitude is reflected in HOLMES POLLOCK LETTERS 34-38 (Howe ed. 1941).

In McPortland v. State, 98 N. Y. S. 2d 665 (3d Dep't 1950) it is suggested that the *only* change in liability for negligence is that which reflects increasing knowledge, but this is an oversimplification.

One further matter may be brought up appropriately here. Not all of a man's conscious sensations and beliefs accurately reflect objective reality. But even his mistaken impressions and beliefs are to be taken into account in judging a man's conduct, and allowance will be made for them provided they are not unreasonable in the light of his background and experience.[80]

SKILL

Skill may be defined as "that special competence which is not part of the ordinary equipment of the reasonable man, but which is the result of aptitude developed by special training and experience."[81] In the life of today the number of activities which are regarded as calling for special skill is ever increasing,[82] and correlatively the skills themselves and the methods of teaching them are constantly being improved and developed. According to the prevailing American view the standard for skill is largely objective.[83] The trend seems to be towards requiring the actor to exercise the degree of skill which the general class of persons engaged in that line of activity have. He must for example act as would the reasonably competent and experienced automobile driver,[84] or engineer,[85] or dentist[86] if he is engaged in driving an automobile or a locomotive or in fixing teeth.[87]

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80. Blood v. Tyngsborough, 103 Mass. 509 (1870).

81. RESTATEMENT, TORTS § 299, comment *a*. Skill obviously may include special knowledge. "The practical and familiar knowledge of the principles and processes of an art, science or trade combined with the ability to apply them in practice in a proper and approved manner and with readiness and dexterity." BLACK'S LAW DICTIONARY p. 1634 (3d ed. 1933). It will be seen, therefore, that this section and the last one overlap.

82. Thus, for example, Pennsylvania requires that persons pursuing the following callings be licensed: architects, bakery operators, barbers, beauty culturists, dental hygienists, dentists, detectives, employment agents, engineers, innkeepers, insurance adjusters, lawyers, midwives, nurses, optometrists, osteopaths, pawnbrokers, pharmacists, physicians and surgeons, pilots, plumbers, real estate brokers, master stevedores, surveyors, undertakers and veterinarians. PA. STAT. ANN. Tit. 63 (Purdon's, 1941).

83. RESTATEMENT, TORTS § 299. *Contra*: Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 26 (1927).

84. Borgstede v. Walbauer, 337 Mo. 1205, 88 S.W. 2d 373, 375 (1935).

85. Louisville & N. R.R. v. Perry's Adm'r, 173 Ky. 213, 190 S.W. 1064 (1917).

86. Donathan v. McConnell, 193 P. 2d 819 (Mont. 1948); Vigneault v. Dr. Hewson Dental Co., 300 Mass. 223, 15 N.E. 2d 185 (1938).

87. While earlier formulations of occupational standards of skill were confined to professional people, such as doctors—see Note, 29 COL. L. REV. 985 (1929) for collection of cases; lawyers—McCullough v. Sullivan, 102 N.J.L. 381, 132 Atl. 102 (1926); accountants—Smith v. London Assur. Corp., 109 App. Div. 882, 96 N. Y. Supp. 820 (2d Dep't 1905); recent developments have been in the direction of gradually working down from those engaged in highly skilled occupations to the semi-skilled trades. See for example Jackson v. Central Torpedo Co., 117 Okla., 245, 246 Pac. 426 (1926) (oil well shooter); Louis Pizitz Dry Goods Co. v. Waldrop, 237 Ala. 208, 186 So. 151 (1939) (restauranteur).

Another form of statement which comes to the same thing is that he must exercise the skill that a reasonably prudent man would have if he attempted to do any of these things.[88] Some authorities seek to justify this result on the theory that the actor has held himself out as having the requisite skill and will be treated accordingly.[89] This analysis may be appropriate enough as between people who have come into some voluntary relationship with each other (as carrier and passenger, doctor and patient, barber and customer). But it is fictitious and not helpful if applied between strangers such as different motorists on the highway, or a railroad and a trespasser on its right of way. In such situations the "holding out" explanation is reminiscent of the fact that all tort duties could by a tour de force and fictitious logic be reduced to implied undertakings, if one insisted in reasoning that way.

Still another approach, sometimes urged, would be subjective; *i.e.*, it would judge a man's acts in the light of the skill he actually possesses. Under this analysis, the unskilled driver who failed to fulfill the objective test but did the best he could would be liable if at all only because he undertook to drive when the reasonable man would know that he lacked the skill to do so safely. In many cases this reasoning too will lead to the same result as would the adoption of an objective test of skill. But in the case of the novice it will not, for a person can scarcely be negligent simply for trying to learn.

The skill required of a beginner is an increasingly difficult problem in our modern society. "No one is born with skill. Everyone must acquire it gradually. There must always be beginners."[90] And in general we need to encourage them. Recent scientific studies, however, have confirmed what common sense suggests—that beginners in dangerous pursuits cause far more than their share of accidents.[91] Obviously this would be largely just because of that lack of skill for which a subjective standard would make allowance The social need for compensating the victims of this over-hazardous group is surely just as great as that of compensating

88. SALMOND, TORTS 31 (10th ed. 1947).

89. "In those employments where peculiar skill is requisite, if one offers his services he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment." Smith v. London Assur. Corp., 109 App. Div. 882, 96 N. Y. Supp. 820 (2nd. Dep't 1905); Seavey, *op. cit. supra* note 83, p. 26.

90. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 27 (1927).

91. HERBERT MOORE, PSYCHOLOGY FOR BUSINESS AND INDUSTRY 359 (2d. ed. 1942); J. TIFFINS, INDUSTRIAL PSYCHOLOGY 294-97 (1942).

the victims of experienced actors. The only problem is whether it is unjust or inexpedient to impose the burden of compensating them on the beginner or, as is generally the case, on his employer or, among those who pay premiums to his insurance carrier. Essentially the same problem has been treated elsewhere.[92] The practical answer which the weight of American authority has made to it here is to hold the beginner to an external standard, *i.e.*, the standard of those who are reasonably skilled and experienced regardless of the precautions taken to safeguard the learning process.[93] As a corrollary of this objective standard, the beginner will not be negligent if his external conduct is that which would be reasonable in a reasonably skilled operator.[94] On the other hand, the standard for skill is subjective to this extent. If an actor has more than reasonable skill, he must probably exercise that which he has.[95] And no doubt in exceptional cases like emergencies in which a reasonable man would do the best he could even without skill, the actor's conduct will be judged in the light of that fact.[96]

Physical, Mental, and Emotional Characteristics

The subjective standard finds its most complete acceptance in the case of physical characteristics. In general, it may be said that the physically handicapped person must act as a reasonably prudent person would if he suffered from the disabilities of the actor. However, the emphasis laid upon

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92. James and Dickinson, *Accident Proneness and Accident Law,* 63. Harv. L. Rev. 769, 782 *et. seq.* (1950).

93. Holland v. Pitocchelli, 299 Mass. 554, 13 N.E. 2d 390 (1938) (picking isolated spot in the country to learn to drive. Contrast this with Restatement, Torts § 299, comment *b);* Goff v. Hubbard, 217 Ky. 729, 290 S.W. 696, 50 A.L.R. 1382 (1927) (driving under dealer's tutelage); Hughey v. Lennox, 142 Ark. 593, 219 S.W. 323 (1920) (upholding the following instruction: "he must possess reasonable skill in operating an automobile before he undertakes to operate said automobile upon the public thoroughfares or highways; if he fails to possess reasonable skill in operating the car or fails to exercise due care in operation of the car, that constitutes negligence." (at p. 325).

In Cleary v. Eckart, 191 Wis. 114, 210 N.W. 267 (1926), the inexperienced defendant was held not liable to his guest for injuries on the ground that plaintiff had assumed the risk of defendant's known inexperience. The assumption of the risk argument would not apply to a stranger. In Holland v. Pitocchelli, *supra,* the court held the defendant liable in the face of the contention that the plaintiff had assumed the risk of her unskilled driving. See Morris, *The Role of Expert Testimony in the Trial of Negligence Issues,* 26 Tex. L. Rev. 1, 18 (1947).

94. Restatement, Torts § 299, comment *b.*

95. Harriss v. Fall, 177 Fed. 79 (C.C.A. 10th 1910) (his own best ability, skill and care); Restatement, Torts § 299, comments *b, d, f.*

96. "The circumstances which justify the actor in so doing are those which would cause a reasonable man to believe that the good which he is likely to accomplish by so doing counterbalances the risk that his lack of skill will do harm." Restatement, Torts § 299, comment *e.*

physical infirmities varies among courts. The majority American view holds that the jury should be instructed to consider what a reasonably prudent man would do under the circumstances—the physical handicap constituting part of the circumstances.[97] The minority charge the jury to consider the actor's conduct in the light of what a reasonably prudent man with a like infirmity would do.[98] The difference is merely one of language.[99] It is often said that the physically handicapped should exercise a higher degree of care than that required of the ordinarily prudent person,[100] but this requirement usually means merely that a handicapped person must often take precautions to compensate for his infirmities that would not otherwise be required of a reasonable man.[101] A blind man will not be required to see, though he may perhaps have to use his other senses more sharply than one who can. Some courts, however, have been explicit

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97. McLaughlin v. Griffin, 155 Ia. 302, 135 N.W. 1107 (1912); Balcom v. City of Independence, 178 Ia. 685, 160 N.W. 305 (1916); Apperson v. Lazro, 44 Ind. App. 186, 87 N.E. 97 (1909). RESTATEMENT, TORTS § 289.

98. Ham v. Lewiston, 94 Me. 265, 47 Atl. 548 (1900); Carter v. Village of Nunda, 55 App. Div. 501, 66 N. Y. Supp. 1059 (4th Dep't 1900); Weinstein v. Wheeler, 27 Ore. 406, 271 Pac. 733 (1928). In Wray v. Fairfield Amusement Co., 126 Conn. 221, 10 A. 2d 600 (1940), the court upheld a charge instructing the jury that a person suffering from a bone condition was required to exercise such care as a reasonably prudent person suffering from that condition would exercise. See also Jones v. Bayler, 49 Cal. App. 2d 647, 122 P. 2d 293 (1942) (a person with faculties so impaired); Muse v. Page, 125 Conn. 219, 4 A. 2d 329 (1939) (near-sighted must use such care as an ordinarily prudent person with a like infirmity would exercise under similar circumstances).

99. See Note, 30 KY. L. J. 220, 221 (1941). Although the extent to which instructions from the bench influence the jury in reaching their decision is largely conjectural, there is usually a controversy between the opposing lawyers concerning the degree of emphasis given physical handicaps in the charge. The claim that too much or too little stress was placed on the actor's physical characteristics is often a ground for appeal. See for example, Charbonneau v. Macrury, 84 N. H. 501, 153 Atl. 457, 73 A.L.R. 1266 (1931) where it was urged, unsuccessfully, that it was error to refer to the factors of a child's age and experience as constituting the standard of conduct.

100. In Karl v. Juniata County, 206 Pa. 633, 56 Atl. 78 (1903), the following charge was upheld: "That if the jury believe from the evidence that the eyesight of John Karl, the plaintiff, was impaired on the night of the accident, the law required a degree of care upon his part beyond the usual and ordinary, proportioned to the degree of his impairment of vision." In Armstrong v. Warner Bros. Theatres Inc., 161 Pa. Super. 285, 54 A. 2d 831 (1947), the court pointed out that a woman seventy-five years old was required to exercise greater vigilance because of her age. See also Winn v. City of Lowell, 1 Allen 177 (Mass. 1861); Carroll v. Chicago B. & Q. R.R., 142 Ill. App. 195 (1900).

101. In Keith v. Worcester & Blackstone Valley St. Ry., 196 Mass. 478, 82 N.E. 680, 14 L.R.A. (N.S.) 648 (1907), the standard of conduct was held to be the same for a near-sighted woman as a normal woman, but she was required to put forth a greater effort to attain the standard. See also Jones v. Bayley, 49 Cal. App. 2d 647, 122 P. 2d 293 (1943).

in their demand that the infirm must exercise a higher than ordinary degree of care.[102]

As we have just noted, persons who know that their faculties are impaired must conduct themselves as the reasonable man would in the light of such infirmities.[103] In extreme cases a court or jury may find that this would mean refraining from certain activities altogether. No doubt a blind man would be negligent as a matter of law in trying to drive a car. But such decisions are fraught with such serious social and political implications in our country where individual freedom in general is still greatly prized and where freedom to engage in the most dangerous activity of all (drive a car) is so much bound up in the way of life and even the self respect of most of us, that except in the clearest cases courts have wisely left these decisions to be made by the political process. Statute apart, therefore a man with one leg and one arm may drive a car and the blind may walk the streets unattended without being negligent if he employs the safeguards which the reasonably prudent person with that infirmity would if he engaged in that activity.[104]

Loss of consciousness through sleep, illness, or the like is to be taken into account and, because negligence presupposes a voluntary act,[105] the

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102. Where a blind man was injured by falling in a ditch, the court instructed the jury that ordinary care for a blind man is higher care than that required for a person in full possession of his faculties—Foy v. Winston 126 N.C. 381, 35 S.E. 609 (1900). In Marks Adm'r v. Petersburg RR., 88 Va. 1, 13 S.E. 299 (1891) a woman blind in one eye was held guilty of contributory negligence for failure to take greater than ordinary precautions. *Contra:* Jones v. Bayley *supra.*, where the court was upheld in refusing an instruction requiring greater than ordinary care of a person with impared faculties; Rosenthal v. Chicago and A. RR., 255 Ill. 552, 99 N.E., 672 (1912) (no higher degree of care than if there were no infirmity); Hill v. Glenwood, 124 Iowa, 479, 100 N.W. 522 (1904) *(semble).*

103. Thus where a streetcar motorman experienced two dizzy spells but continued to run the streetcar until he fainted, a judgment for the defendant was reversed on the ground that the motorman had warning, and, therefore, knowledge of the attack—Goldman v. N.Y.R.R., 185 App. Div. 739, 173 N. Y. Supp. 737 (1st Dep't 1919). But where the actor had no knowledge that her knee was weak, she could not be required to exercise greater care—Greenlee v. City of Belle Plain, 204 Iowa 1055, 216 N.W. 774 (1927).

104. This problem is to be distinguished from the question of the care which should be taken by *others* towards persons with physical infirmities.

105. "He must have done that which he ought not to have done or omitted that which he ought to have done, as a conscious being endowed with a will . . . Nowhere in cases dealing with the subject of torts do we find the suggestion that a person should be held responsible for injuries inflicted during periods of unconsciousness." per Barnes, J., in Lobert v. Pack, 337 Pa. 103, 9 A. 2d 365 (1939) (guest while asleep kicked driver causing him to lose control). See also Welden Tool Co. v. Kelley, 76 N.E. 2d 629 (Ohio App. 1947) (defendant motorist excused when he blacked out); Cohen v. Petty, 62 App. D. C. 187, 65 F. 2d 820 (1933) (illness); See Holmes v. McNeil, 356 Mo. 846, 848, 204 S.W. 2d 303 (1947).

In a recent article, the authors very persuasively contend for a different rule.

actor cannot be negligent for what he does or fails to do while he is unconscious. Usually, however, sleep does not come on a man without warning, and he will be negligent if he fails to heed the warning in the way that a reasonable man would.[106] The same may be true of a fainting spell or other seizure. Moreover, a man who suffers such an attack often has had them before, and where that is so he must take such account of his susceptibility as a reasonable man would.[107] Involuntary intoxication (if a case of it were ever presented!) should stand on the same footing and allowance should be made for the partial or total impairment of faculties which it induced. Voluntary intoxication, however, is generally said to be no excuse for acts or omissions which fail to conform to the conduct of a reasonable and sober man,[108] though it does not in the absence of statute

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Kaufman and Kantrowitz, *The Case of the Sleeping Motorist,* 25 N.Y.*U.L.Q.* REV. 362 (1950). This article concedes that the driver's conduct should generally be tested by the fault principle. "But" it is urged "when he goes insane, faints, or falls asleep while propelling his automobile along the highway, he ceases to be a driver. The risks of ceasing to be a driver while his car goes rolling along should be borne by him and not by the hapless individual who gets hit. The driverless, but moving automobile is a mechanized wild beast. Responsibility for the harms caused by the involuntary abandonment of an automobile *ferae naturae* should be in the one from whose leash the beast has escaped."

An appendix to this article contains a valuable collection of cases on this subject. I confess that for my part I am quite won over by the authors' position.

106. Baird v. Baird, 223 N. C. 730, 28 S.E. 2d 225 (1943). In Diamond State Tele. Co. v. Hunter, 41 Dela. 336, 21 A. 2d 286 (1941), the court held that the mere fact of going to sleep while driving created a rebuttable presumption of negligence.

107. Goldman v. N. Y. R.R., *supra.,* n. 103; Weldon Tool Co. v. Kelley, *supra,* n. 105. In Waters v. Pacific Coast Dairy Inc., 55 Cal. App. 2d 789, 131 P. 2d 588 (1942), the court held that the failure of the defendant to come forward and show nature of attack causing loss of control and to prove that he had no reason to anticipate the attack meant that the defendant had failed to establish his conduct as that of a reasonably prudent man.

108. Straughan's Adm'r v. Fendly, 301 Ky. 209, 191 S.W. 2d 391 (1945); McMichael v. Pennsylvania R. R., 331 Pa. 584, 1 A. 2d 242 (1938); Scott v. Gardner, 137 Tex. 628, 156 S.W. 2d 513 (1941) (applies whether plaintiff or defendant).

Sometimes it is said that the negligence consists in getting drunk. But that does not always involve unreasonable risk of harm. Suppose, for instance, that two or three men with no car or firearms were getting quietly and good-naturedly drunk in an isolated cabin on a fishing trip, and that the only driver in the lonely farm house nearby, which had no telephone and is at the end of a dirt road 10 miles from the nearest neighbor, is taken suddenly and seriously ill. Would it be negligent for the least drunk fisherman to drive the farmer to the hospital, and if he did so, should not he be judged by the standard of the reasonably prudent drunken man (at least in the absence of statute or where statutory breach is treated as only evidence of negligence)?

While the rule about drunkenness is pretty clear, the reasoning is not. The complete lack of consideration for it is no doubt partly due to a feeling of moral condemnation.

itself constitute negligence where it does not bring about such acts or omissions.[109]

The overwhelming majority of the cases which involve a consideration of the physical characteristics of the actor are concerned with handicapped plaintiffs.[110] It is a source of wonder why the infirmities of defendants are brought out for consideration in so few instances.[111] Usually, consideration by the court of his physical condition aids recovery for an infirm plaintiff whose conduct might otherwise be considered negligent. Thus, the harshness of the doctrine of contributory negligence is actually mitigated for one class of the injured. While a subjective treatment of physical characteristics is perfectly consistent logically with an attempt to refine the fault principle, it is highly significant that such a treatment actually operates to assure the injured party of compensation rather than to allow the defendant to escape liability.

As far as mental and emotional characteristics are concerned, the prevailing view is that the jury will be told to apply an objective test,[112] that is to hold the actor to the intelligence and stability of the standard man, though it is a little hard to believe they will always faithfully heed the admonition.[113] As we have seen, recent studies have shown that while

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109. Emery v. Los Angeles R. Corp., 61 Cal. App. 2d 455, 143 P. 2d 112 (1943); Gerst v. Moore, 58 Ida. 149, 70 P. 2d 403 (1937) (same degree of care as person not intoxicated); Remmenga v. Selk, 150 Neb. 401, 34 N.W. 2d 757 (1948) (care of ordinarily prudent sober person). But where plaintiff's intoxication was the direct cause of the injury, he has been held contributorily negligent as a matter of law.

110. A breakdown of the types of physical defects which were brought to the court's attention by plaintiffs attempting to escape contributory negligence shows that the majority of the cases are concerned with blindness or defective eyesight. The next most important category is deafness and defects in hearing. There are surprisingly few cases dealing with any other type of physical handicap.

111. The cases dealing with the physical characteristics of defendants are confined almost exclusively to situations where the defendant has lost control of a vehicle through temporary illness or unconsciousness. The WEST'S DIGEST has no section dealing with the physical disabilities of defendants although there is a section on the physical disabilities of plaintiffs (Negligence, keynote 86). CORPUS JURIS and similar collections give the subject of defendants' physical handicaps scant consideration and cite no cases. The conclusion is inescapable that defendants rarely if ever attempt to interject their physical disabilities in order to escape or mitigate the standard of the reasonably prudent man.

112. "The law takes no account of the infinite variety of temperament, intellect and education which make the internal character of a given act so different in different men." HOLMES, THE COMMON LAW 108 (1881).

113. Note, for example, the following statement by GREEN: "There is nothing in Vaughn v. Menlove (1837), 3 Bing. N. C. 468 contradictory of this statement . . . .In Vaughn v. Menlove the only question involved is as to the proper method of leaving the issue to the jury. But the 'under the circumstances' of that case allowed the jury to consider defendant's bona fides, his judgment, knowledge, etc.

intelligence has relatively little to do with it, many of the factors which are associated with accident proneness are mental or emotional.[114] Such aspects of accident proneness will probably not be taken into account. Other aspects of these studies, however, have been concerned with such factors as reaction time and esthetokinetic coordination.[115] The courts may well treat such things as physical characteristics and allow the jury to judge each individual according to his own, at least for the purpose of tempering contributory negligence.

Age, Sanity

Where a child is injured, American authority uniformly makes allowance for his immaturity in judging his contributory negligence.[116] But even here the test is not entirely individualized. The child is to be held "to the exercise of the degree of care which ordinary children of his age, intelligence, and experience, ordinarily exercise under similar circumstances."[117] This means that he will be judged according to his own intelligence, experience and mental capacity so far as ability to perceive the risk goes. But given perception of the risk, as determined by this test, the child will be held to exercise the judgment of the standard child having the other qualities (just mentioned) of the actor.[118] Thus, the rashness or impetuosity of the actor, if greater than average, will not relieve him from a charge of negligence.[119]

This relaxation of the test for contributory negligence in the case of children has not only been reflected in the language of instructions to the jury. There are a good many crystallized rules that certain given combina-

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as is done in other cases. The court very correctly perceived the impossibility of stating a rule for each person. But that impossibility does not in any manner avoid the fact that if defendant in such a case were a poor ignorant 'Brazes bottom' negro farmer on the one hand or a prosperous agricultural chemist on the other, such would be a most vital factor in the case although the judge would give the same formula in each case." Judge and Jury 167n (1930).

114. See James and Dickinson, *op. cit.* note 92, *supra, 773 et seq.*

115. *Id.*, at 773.

116. Shulman, *The Standard of Care Required of Children,* 37 Yale L. J. 618 (1927); Bohlen, *Liability in Tort of Infants & Insane Persons,* 23 Mich. L. Rev. 9 (1924); Wilderman, *The Question of an Infant's Ability to be Guilty of Contributory Negligence,* 10 Ind. L. J. 427; Note 107 A.L.R. 100 (1937).

117. Ackerman v. Advance Petroleum Transport, 304 Mich. 96, 7 N.W. 2d 235, 239 (1942); Harvey v. Cole, 159 Kan. 239, 153 P. 2d 916, 918 (1944); Frazier v. Northern Pac. Ry., 28 F. Supp. 20, 24 (Idaho, 1939). See Shulman, *The Standard of Care Required of Children,* 37 Yale L. J. 618, 622 (1927).

118. Shulman, *op. cit. supra,* p. 625.

119. Ackerman v. Advance Petroleum Co., 304 Mich. 96, 7 N.W. 2d 235 (1942). See Collins v. South Boston R.R., 142 Mass. 301, 315, 17 N.E. 856, 860 (1886).

tions of conduct constitute negligence as a matter of law.[120] There have been many instances where children have been relieved from the operation of a rule like this because of their age, and the question of their contributory negligence sent to the jury.[121] Nevertheless, in very clear cases children may be found contributorily negligent as a matter of law.[122]

The question of how old a child may be and yet have his immaturity considered does not give much trouble under the prevailing American doctrine which treats the matter as one of degree to be worked out in each case where the plaintiff is technically a minor under its individual circumstances. While theoretically there is no age at which contributory negligence is impossible,[123] the universal view is to set an age below which a child is held to be incapable of contributory negligence. The great majority of states have established three as the age below which they will not allow consideration of contributory negligence.[124] Above that age, the general formula is kept flexible. Some states, however, have adopted rules of thumb on the analogy of rules of the criminal law for determining the ages at which children could be guilty of criminal intent.[125] In these states,

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120. See, *e.g.*, Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONT. PROB. 476 (1936); James, *Accident Liability: Some Wartime Developments*, 55 YALE L. J. 365, 374 (1946); James, *Chief Justice Maltbie and the Law of Negligence*, 24 CONN. B. J. 61, 63 (1950).

121. See Note, 107 A.L.R. 4, 164 (1937) (and cases there collected). See also Mertz, *The Infant and Negligence Per Se in Pennsylvania*, 51 DICK. L. REV. 79 (1947). In Connecticut, by statute, the negligence of minors for statutory violation is a question of fact for the jury. CONN. GEN. STAT. § 7948 (Rev. 1949). But *cf.* D'Ambrosio v. Philadelphia, 354 Penna. 403, 47 A. 2d 256 (1946) (12 year old plaintiff contributorily negligent as a matter of law for violating statute).

122. Ackerman v. Advance Petroleum Transport, 304 Mich. 96, 7 N.W. 2d 235 (1942) (8 year old boy running into street without looking); Lobsenz v. Rubenstein, 258 App. Div. 164, 15 N. Y. S. 2d 848 (2d Dep't 1939), *aff'd.* 283 N. Y. 600, 28 N.E. 2d 22 (1940) (15 year old plaintiff slipping into known depression in tennis court). See Note, 107 A.L.R. 4 (1937).

123. "The civil irresponsibility of a young child is not regarded as an invariable concomitant of a certain age—except it be little if anything beyond swaddling clothes—to be arbitrarily fixed upon such age alone, but is to be determined as existing or not, from all the applicable circumstances, like any other question of fact." per Graves, J., in Sorrentino v. McNeill, 122 S.W. 2d 723, 725 (Tex. Civ. App. 1938).

124. See for example Verni v. Johnson, 295 N. Y. 436, 68 N.E. 2d 431 (1946) (child three years two months old conclusively presumed to be incapable of contributory negligence). See Note, 22 N. Y. U. L. Q. REV. 131 (1947). For a collection of cases by states as to the age limits below which young children have been held incapable of contributory negligence as a matter of law, see Note, 107 A.L.R. 4 (1937). See Wilderman. *The Question of an Infant's Ability to be Guilty of Contributory Negligence*, 10 IND. L. J. 427 (1935).

125. Patrick v. Mitchell, 242 Ala. 414, 6 So. 2d 889 (1942); Moser v. East St. Louis Interurban Water Co., 326 Ill. App. 542, 62 N.E. 2d 558 (1945); Dixon v. Stringer, 277 Ky. 347, 126 S.W. 2d 448 (1939); Nelson v. Arrowhead Freight

children under seven are conclusively presumed to be incapable of contributory negligence; as to those between seven and fourteen there is a rebuttable presumption that they have been careful (and their conduct is judged by the subjective standard indicated above); children over fourteen are treated like adults. Such a rule seems pretty mechanical and arbitrary. Even if its counterpart has validity in the criminal law the existence of any significant degree of correlation between the rates of development of a child's sense of right and wrong on the one hand, and his perception of danger and judgment of speeds and distances on the other, seems questionable.

The vast majority of cases relaxing the standard of conduct of children have, as has often been noted, dealt with contributory negligence. Commentators have been divided on the question whether there should be a similar relaxation where a child is sought to be held liable for injuries he has inflicted on another. The few appellate courts that have faced the problem have also been divided,[126] though there is reason to believe that trial courts are generally applying an objective adult standard in motor vehicle cases.[127] I have elsewhere tried to examine the doctrinal and practical considerations involved in this problem.[128] It was there noted that by and large children themselves cannot and do not pay for the injuries they cause; that such payment comes if at all from an employer or from

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Lines, 99 Utah 129, 104 P. 2d 225 (1940); Mert, *The Infant and Negligence per se in Pennsylvania,* 51 DICK. L. REV. 79 (1947); Wilderman, *The Question of an Infant's Ability to be Guilty of Contributory Negligence,* 10 IND. L. J. 427 (1935). For a collection of cases from the states adhering to the crimminal law rule, see Note, 107 A.L.R. 4 (1937).

126. In favor of a subjective standard—Briese v. Maechtle, 146 Wis. 89, 130 N.W. 893, 35 L.R.A. (N.S.) 574, (1911) (playground injury); Charbonneau v. MacRury, 84 N. H. 501, 153 Atl. 457, 73 A.L.R. 1266 (1931) (17 year old automobile driver); Harvey v. Cole, 159 Kan. 239, 153 P. 2d 916 (1944) (same instruction for 16 year old automobile driver as for 9 year old plaintiff as to standard of care); Hoyt v. Rosenberg, 80 Cal. App. 2d 500, 182 P. 2d 234 (1947) (12 year old boy playing "Kick the can.") Bohlen, *Liability in Torts of Infants and Insane Persons,* 23 MICH. L. REV. 9 (1924). Against a subjective standard—Neal v. Gillett, 23 Conn. 437 (1855) (playground injury); Roberts v. Ring, 143 Minn. 151, 173 N.W. 437 (1919) (dictum). Terry, *Negligence,* 29 HARV. L. REV. 40, 47 (1915).

However, even in those states inclined toward a subjective standard, the courts have refused to apply the standard to determine the liability of an employer for the negligence of his minor servant—Hill Transp. Co. v. Everett, 145 F. 2d 746 (C.A.A. 1st 1944).

127. This has been reported to me as being the actual situation in Wisconsin. Letter of Richard v. Campbell to author, dated Dec. 13, 1946. See also Transcript of Record, p. 94, Rozell v. Rozell, 281 N. Y. 106, 22 N.E. 2d 254 (1939) (charge to jury).

128. See James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L. J. 549, 554 (1948); James and Dickenson, note 92, *supra.*

insurance which the children themselves have not furnished; that they constitute one of the most dangerous classes in society so far as causing motor accidents goes. It was my conclusion that courts should and probably will (for the most part) hold the child defendant who is engaging in dangerous adult activities (such as driving a car) to the standard of the reasonably prudent adult. It is less important and more doubtful what rule will emerge as to injuries caused by children at play.

Advanced age, like youth, has its shortcomings though they are different ones. Where these involve any impairment of faculties, that fact ought to be considered in judging conduct.[129]

There is only a scant handfull of decided cases dealing with the matter of insanity, though it was the subject of one of the very earliest dicta.[130]

Probably a subjective standard will be applied in determining the contributory negligence of insane plaintiffs.[131] While many courts require that the plaintiff be devoid of intelligence to the extent that he is unable to apprehend danger before allowing a relaxation of the standard,[132] other courts have allowed the jury to consider mental shortcomings of the merely subnormal.[133] On the other hand, while the question is still an open one

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129. At least so far as a plaintiff is concerned. Kitsap County Transportation Co. v. Harvey, 15 F. 2d 166, 48 A.L.R. 1420 (C.A.A. 9th 1927); See Johnson v. St. Paul Ry., 67 Minn, 260, 262, 69 N.W. 900, 36 L.R.A. 586 (1919). *But cf.* Roberts v. Ring, 143 Minn. 151, 173 N.W. 437 (1919) (reversing such a charge for a 77 year old *defendant* automobile driver with defective sight and hearing, while approving a requested instruction that a 7 year old *plaintiff's* conduct is to be judged in the light of his age and mental capacity). Weaver v. Ward, Hobart 134, 80 Eng. Reprint 284 (1617). A collection of recent decisions and dicta appears in RESTATEMENT OF THE LAW 654 *et seq.* (1948 SUPP.).

130. Weaver v. Ward, Hobart 134, 80 Eng. Reprint 284 (1617). A collection of recent decisions and dicta appears in RESTATEMENT OF THE LAW 654 *et seq.* (1948 Supp.).

131. See Bohlen, *Liability in Tort of Infants and Insane Persons,* 23 MICH. L. REV. 9 (1924); *Horblower, Insanity and the Law of Negligence,* 5 COL. L. REV. 278 (1905); Wilkinson, *Mental Incompetency as a Defense to Tort Liability,* 17 ROCKY MOUNT. L. REV. 38 (1944); Cook, *Mental Deficiency in Relation to Tort,* 21 COL. L. REV. 333 (1921). Upon the point, however, the American Law Institute "expresses no opinion." RESTATEMENT, TORTS § 464, *caveat.*

132. Zajaczkowski v. State, 189 Misc. 299, 71 N. Y. S. 2d 261 (Ct. Cl. 1947) mongoloid of mental age of 2½ held incapable of contributory negligence as a matter of law); Ruoback Drug Co. v. Wray, 111 Ind. App. 467, 39 N.E. 2d 776 (1942); Worthington v. Mencer, 96 Ala. 310, 11 So. 72, 17 L.R.A. 407 (1892).

133. Seattle Electric Co. v. Hovden, 111 C.A.A. 191, 190 Fed. 7 (C.A.A. 9th 1911), *aff'mng* Hovden v. Seattle Electric Co., 180 Fed. 487 (C.C. 1910) (intelligence below normal); Johnson v. St. Paul City Ry., 67 Minn. 260, 69 N.W. 900 (1887) (mental powers blunted with age). See Baltimore & P. RR. v. Cumberland, 176 U. S. 232, 238 (1900).

in American law,[134] the American Law Institute has finally thrown the weight of its opinion behind the proposition that insane and subnormal defendants be held to the standard of the reasonably prudent man, thus repudiating the weight of earlier academic authority.[135] The writer gladly welcomes this move which is consistent with the double standard of conduct for plaintiffs and defendants which we have already discussed.[136]

134. See Bohlen, *op. cit. supra,* n. 131; Hornblower, *op. cit.* n. *supra.,* 131 Wilkinson, *op. cit. supra* note 131; RESTATEMENT, TORTS, § 283 *caveat.* There have been only two opinions dealing directly with the negligence of the insane, both holding the defendants to the standard of the reasonably prudent man. One is obscure—Williams v. Hays, 143 N. Y. 442, 38 N.E. 449, 26 L.R.A. 154 (1894), *qual'd,* 157 N. Y. 541, 52 N.E. 589, 43 L.R.A. 253 (1899); the other, Sforza v. Green Bus Lines, Inc., 150 Misc. k80 N. Y. Supp. 446 (Mum. Ct. N. Y. 1934), is distinguishable both for its reliance on the above opinion, and on the ground that the employer was invoking the servant's insanity to avoid liability. *Cf.* Hill Transp. Co. v. Everett 145 F. 2d 746 (C.C.A. 1st 1944) (relaxed standard not applied in favor of infant's employer, under New Hampshire law). Fortunately, however, these possible grounds of distinction did not prevent the American Law Institute from relying on this case in making the changes described in the text.

135. Bohlen, *op cit. supra,* n. 131; Hornblower, *op. cit. supra, n* 131; Wilkinson, *op. cit. supra* n. 131; Cook, *op. cit. supra* n. 131. The change made by the Institute appears in AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW pp. 654 *et seq.* (1948 Supp.).

136. See above p. 2.